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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY JOE BURELL, SR.,

Defendant and Appellant.

F037992

(Super. Ct. No. 81504)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin and Robert Anspach, Judges.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Louis M. Vasquez and Kathleen A. McGurty, Deputy Attorneys General, for Plaintiff and Respondent.

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On October 26, 2000, the Kern County District Attorney filed an information charging appellant with two felonies: (1) possession of a controlled substance for sale (Health & Saf. Code, § 11378) (count 1); and (2) possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) (count 2). Appellant was also charged with possession of paraphernalia, a misdemeanor (Health & Saf. Code, § 11364) (count 3).

Count 1 included an allegation that appellant suffered a previous conviction within the meaning of Health and Safety Code section 11370.2, subdivision (c). Counts 1 and 2 included two prior prison term allegations (Pen. Code, § 667.5, subd. (b)).

On January 8, 2001, appellant filed a motion to traverse a search warrant and suppress evidence pursuant to Penal Code section 1538.5. On January 23, 2001, the Honorable Sidney P. Chapin conducted an in camera hearing to review the sealed search warrant and affidavit in support of the search warrant. The trial court: ordered the affidavit to remain sealed, as well as the court reporter's notes of the in camera hearing; found the affidavit provided probable cause to issue a search warrant; ordered disclosure of the search warrant itself and the return on the warrant; and denied appellant's motion to traverse the search warrant. The court released a redacted copy of the affidavit to defense counsel. The trial court then conducted a hearing on appellant's motion to suppress, which it took under submission. On January 25, 2001, the court denied appellant's suppression motion.

On February 13, 2001, the Honorable Robert Anspach granted appellant's motion to bifurcate his prior convictions. On February 26, 2001, a jury was impaneled to try the case. On March 2, 2001, the jury returned its verdict. The jury hung on count 1 and returned a guilty verdict on counts 2 and 3. The court declared a mistrial as to count 1, which the prosecutor then dismissed pursuant to Penal Code section 1385. On March 7, 2001, after appellant waived his right to a jury trial on the prior convictions, a court trial was held on the prior convictions, which the court found true.

On April 4, 2001, the trial court denied probation and sentenced appellant to state prison for a total term of four years as follows: (1) count 2—the two-year midterm; (2) court 3—a concurrent six-month term; and (3) prior prison terms—2 one-year enhancements. Appellant received 52 days' presentence custody credit. Appellant was ordered to register as a narcotics offender (Health & Saf. Code, § 11590) and pay two $200 restitution fines pursuant to Penal Code sections 1202.4, subdivision (b), and

1202.45, with the section 1202.45 fine suspended pending successful completion of parole.

On April 18, 2001, appellant filed a timely notice of appeal from the April 4, 2001, judgment and sentence. On appeal, appellant contends (1) the trial court should have granted his motion to suppress because the search warrant failed to establish probable cause to search his residence, (2) the case should be reversed and remanded for sentencing under Proposition 36, (3) the trial court abused its discretion in finding him statutorily ineligible for probation, and (4) he was deprived of two days of presentence custody credits. We will find the court erred in its award of presentence custody credit and modify the judgment accordingly. In all other respects, we will affirm.

FACTS

Since appellant raises no issues regarding the underlying facts, a brief summary of the crime will suffice. Based on information provided by a confidential informant that appellant was involved in the sale of methamphetamine, a search warrant was issued for appellant's residence in Taft. Sheriff's deputies served the warrant at approximately 9:51 p.m. on August 8, 2000. The deputies identified themselves and demanded entry, but received no response. Deputies forced the door open, but found no one in the residence.

The search of appellant's residence yielded several grams of suspected methamphetamine, an electronic gram scale, a suspected "pay-owe" sheet, a hypodermic syringe, and $1,100 cash. A bottle of powdered niacin, which is commonly used to "cut" methamphetamine, was seized along with two television monitors and two cameras mounted on the exterior of appellant's residence.

Shortly thereafter, appellant was located and arrested for possession of methamphetamine for sale. Analysis of the suspected controlled substance confirmed it was 10.66 grams of a material containing methamphetamine.

DISCUSSION

I. Motion to Suppress

After reviewing the sealed affidavit and search warrant, and hearing the in camera witness testimony, the trial court found that the sealing of the affidavit was necessary as "[t]here are valid grounds for maintaining confidentiality," and that the affidavit for the search warrant established probable cause for issuance of the warrant. Appellant asks us to review the sealed affidavit and the sealed transcript of the in camera hearing. Mindful that "[t]he issue posed in this case reflects the inherent tension between the public need to protect the identities of confidential informants, and a criminal defendant's right of reasonable access to information upon which to base a challenge to the legality of a search warrant[,]" we have conducted the review appellant requested. (*People v. Hobbs* (1994) 7 Cal.4th 948, 957.)

Nothing in the sealed affidavit, the sealed transcript of the in camera hearing, or the public record suggests any misrepresentation, material or otherwise, by the affiant in applying for the search warrant. (*Franks v. Delaware* (1978) 438 U.S. 154, 155-156; *People v. Hobbs*, *supra*, 7 Cal.4th at pp. 976-977.) We find the trial court exercised sound discretion in reviewing the affidavit and in hearing the in camera witness testimony, in sealing the affidavit to protect the identity of the confidential informant, and in finding the affidavit for the search warrant, together with the confidential document, established probable cause for issuance of the warrant. (*Ibid.*; *People v. Luttenberger* (1990) 50 Cal.3d 1, 20-24; Evid. Code, § 915, subd. (b).)

II. Proposition 36

Appellant claims he should receive the benefit of the Substance Abuse and Crime Prevention Act of 2000, an initiative measure the voters approved as Proposition 36 at the General Election on November 7, 2000. Proposition 36 changed sentencing law so that a defendant convicted of a nonviolent drug possession offense is generally sentenced

to probation, rather than incarceration, with the completion of a drug treatment program.[1] Section 8 of the initiative expressly provides that Proposition 36 applies prospectively, effective July 1, 2001. (Prop. 36, § 8.)[2] Appellant was sentenced on April 4, 2001, to a total term of four years. He filed a notice of appeal on April 18, 2001; this appeal was pending in July 2001. Appellant argues the statute applies to him because his conviction has not become final due to the pendency of this appeal.[3]

The Second District Court of Appeal has held that conviction "within the meaning of [Penal Code] section 1210.1 means adjudication of guilt *and* judgment thereon." (*DeLong*, *supra*, 93 Cal.App.4th at p. 570; accord, *In re Scoggins* (2001) 94 Cal.App.4th 650, 657; *People v. Legault* (2002) 95 Cal.App.4th 178, 181.) In *DeLong*, the defendant was found guilty before July 1, 2001, but sentenced after the effective date of Proposition 36. The court concluded that conviction did not occur until the point of sentencing. We agree with *DeLong* that, unlike the majority of penal statutes, the broader definition of the word "conviction" as referencing both adjudication of guilt and pronouncement of judgment should be applied to Proposition 36.

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[1]"The statutory scheme consists of the following sections: Penal Code section 1210, which defines various terms; Penal Code section 1210.1, which provides for probation and drug treatment for persons convicted of a nonviolent drug possession offense; Penal Code section 3063.1, generally providing for drug treatment rather than parole revocation if a parolee commits a nonviolent drug possession offense or violates a drug-related condition of parole; and Health and Safety Code sections 11999.4 through 11999.13, pertaining to funding for substance abuse treatment." (*In re DeLong* (2001) 93 Cal.App.4th 562, 566 (*DeLong*).)

[2]Section 8 of Proposition 36 reads: "Except as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively." We agree with the cases cited below in the text which hold that the principle explained in *People v. Nasalga* (1996) 12 Cal.4th 784, 793, and *In re Estrada* (1965) 63 Cal.2d 740, 748, that where a statute mitigates punishment for an offense and there is no saving clause, the amendment will operate retroactively so that the lighter punishment is imposed, is inapplicable to Proposition 36 due to the express language of section 8, which indicates a Legislative intent that the provision apply prospectively only.

[3]This issue is currently before the California Supreme Court in *People v. Floyd* (2002) 95 Cal.App.4th 1092, review granted May 1, 2002, S105225, and *People v. Fryman* (2002) 97 Cal.App.4th 1315, review granted July 31, 2002, S107283.

The issue then is whether the definition of the term "conviction" should be expanded to include cases in which sentence was pronounced prior to July 1, 2001, but which are not yet final because an appeal has been filed. We conclude it should not, since such a conclusion would run directly counter to a long line of authority rejecting the proposition that one is not convicted of a crime until the judgment has been affirmed on appeal. (*McKannay v. Horton* (1907) 151 Cal. 711, 718-722 [defendant convicted of a felony within the meaning of a charter provision for removal from office even though an appeal of the judgment and sentence was pending]; *People v. Clapp* (1944) 67 Cal.App.2d 197, 200 [rejecting defendant's argument that he had not been convicted of a prior offense at the time he was tried on a later charge because his judgment of conviction in the former case was on appeal]; *In re Morehead* (1951) 107 Cal.App.2d 346, 350 [the term "convicted" does not "mean a final determination of guilt after an appeal has been taken"] disapproved in part on another ground in *Thurmond v. Superior Court* (1957) 49 Cal.2d 17, 21; *Tuffli v. Governing Board* (1994) 30 Cal.App.4th 1398, 1406 [summary dismissal of teacher convicted of a sex offense was valid until the judgment was reversed on appeal, reasoning that the term "conviction" as used in Ed. Code, § 44836 does not include an implied qualifier "'that is affirmed on appeal'"].)

While in *In re Sonia G.* (1984) 158 Cal.App.3d 18 (*Sonia G.*) the term "conviction" was held to refer only to judgments that were affirmed on appeal, we do not find the case persuasive on this point. *Sonia G.* held that the state cannot initiate a proceeding to terminate parental rights until the parent's criminal conviction is affirmed, concluding that the term "conviction" references entry of judgment, and a judgment is not final if it can be set aside. The court held the term "conviction" as used in the applicable statute references judgments that have been affirmed on appeal. (*Id.* at p. 23.) *Sonia G.*, however, did not cite any cases directly supporting its definition of the term "conviction" as requiring affirmance on appeal. The only case it cited in support of the proposition that a judgment is not final if there remains a legal means to set it aside, typically by way of an appeal, is *Stephens v. Toomey* (1959) 51 Cal.2d 864, 869. (*Sonia*

G., *supra*, at p. 22.) *Sonia G.*, however, failed to mention that *Stephens* did not hold that a judgment must be affirmed on appeal to constitute a conviction; it only determined that where criminal proceedings against the petitioner were suspended during a period of probation and the "judgment may or may not become final depending upon the outcome of the probation proceedings," the petitioner may register as an elector. (*Stephens v. Toomey*, *supra*, at p. 875.) The *Stephens* court took pains to point out that if probation were revoked, "[t]he judgment would then be final and the constitutional provision fully effective." (*Ibid.*) Thus, *Stephens* does not support the proposition that one is not "convicted" until the judgment and sentence is affirmed on appeal.

There is no evidence supporting the proposition that the drafters of this initiative and voters of the State of California intended to give the word "conviction" a more expansive meaning than historically has been applied to the term. Therefore, we conclude that the term "conviction" as used in Proposition 36 does not include the implied amplifier "and affirmed on appeal." Appellant was convicted on April 4, 2001, the date on which he was sentenced. Because his conviction preceded the operative date of Proposition 36, he does not fall within its ambit.

Appellant contends that an equal protection problem is created if Proposition 36 is interpreted as not applying to cases such as his, where the defendant is found guilty and sentenced prior to July 1, 2001, but whose judgment is not yet final. As explained above, Proposition 36 applies prospectively to convictions occurring on or after July 1, 2001. Appellant does not fall within the ambit of this initiative because he was convicted before its effective date. Thus, appellant is not similarly situated to the class of individuals who were convicted after the initiative's effective date. It is established that "[t]he constitutional guarantee of equal protection does not mandate uniform operation of the law with respect to different persons or classes." (*People v. Heard* (1993) 18 Cal.App.4th 1025, 1029-1030.)

Moreover, there is a rational basis for making a distinction between these two classes. The Legislature is not compelled to give sentencing changes retroactive effect.

(*Talley v. Municipal Court* (1978) 87 Cal.App.3d 109, 114.) The initiative's effective date was delayed until July 1, 2001, to allow the state time to establish a sufficient number of drug treatment programs available to receive eligible defendants. (*DeLong*, *supra*, 93 Cal.App.4th at p. 569.) Prospective application of the initiative helps ensure that the transition will be orderly and effective and reduces the risk that existing drug treatment programs will be overloaded. This is quite reasonable and rational. (See *People v. Flores* (1986) 178 Cal.App.3d 74, 88 [rational basis test applied to the failure to distinguish the sentences for first and second degree attempted murder].) Accordingly, we conclude that prospective application of Proposition 36 does not violate a defendant's equal protection guaranty. (*Talley v. Municipal Court*, *supra*, 87 Cal.App.3d at pp. 114-116.)

We reject appellant's assertion that the strict scrutiny standard applies. In *People v. Olivas* (1976) 17 Cal.3d 236, which appellant relies on, our Supreme Court applied the strict scrutiny standard and concluded it was a denial of equal protection to confine a person under the age of 21 to a longer term in the Youth Authority than he or she would be confined in jail for committing the same misdemeanor offense if over 21. In reaching this conclusion, the court stated that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions." (*Id.* at p. 251.)

Prior to *People v. Olivas*, our Supreme Court applied the rational basis standard to a new statute prospectively awarding presentence custody credit in *In re Kapperman* (1974) 11 Cal.3d 542, 545. The court stated that the equal protection clauses of the federal and state Constitutions "prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction, and require that classifications between those to whom the state accords and withholds substantial benefits must be reasonably related to a legitimate public purpose." (*Ibid.*) The court did not consider whether a fundamental right was at stake.

Some California courts have followed *Olivas* in applying strict scrutiny to penal code classifications. (See, e.g., *People v. Murray* (1994) 23 Cal.App.4th 1783, 1792 [the double base term limit should apply to sentences for both felonies and misdemeanors]; *In re Jiminez* (1985) 166 Cal.App.3d 686, 691-692 [conduct credits should be available to misdemeanants while in the California Rehabilitation Center]; *People v. Poole* (1985) 168 Cal.App.3d 516, 525-526 [work-time credits unavailable before sentencing]; *People v. Caruso* (1984) 161 Cal.App.3d 13, 17 [same].) Other California courts have concluded that *Olivas* was not intended to apply so broadly as to subject every penal code classification to strict scrutiny. (*People v. Davis* (1979) 92 Cal.App.3d 250, 258 [rational basis to classify cocaine as a narcotic rather than a stimulant]; *People v. Mitchell* (1994) 30 Cal.App.4th 783, 795-796 [rational basis to criminalize possessing over $100,000 to purchase drugs]; *People v. Bell* (1996) 45 Cal.App.4th 1030, 1048-1049 [rational basis to criminalize repeated rent skimming].)

In concluding that "personal liberty is a fundamental interest," *Olivas* did not consider the degree to which a valid criminal conviction substantially diminishes an individual's interest in liberty. The United States Supreme Court has observed that a convicted person does not have a constitutional or inherent right to be conditionally released before the expiration of a valid sentence, since "the conviction, with all its procedural safeguards, has extinguished that liberty right: '[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his [or her] liberty.' [Citation.]" (*Greenholtz v. Nebraska Penal Inmates* (1979) 442 U.S. 1, 7.)

In *Chapman v. United States* (1991) 500 U.S. 453, the United States Supreme Court rejected a claim that arbitrary federal drug sentences violated a fundamental liberty interest, reasoning that while every person has a fundamental right to liberty in that the government may not punish him or her until it proves his or her guilt beyond a reasonable doubt in a constitutionally adequate criminal trial, "a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his [or her] offense, so long as that penalty is not cruel and unusual, [citations], and so

long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." (*Id.* at p. 465.) The court noted that an argument based on equal protection essentially duplicates an argument based on due process. (*Ibid.*)

The California Supreme Court, in discussing whether a defendant has a federal constitutional right to a jury trial on a sentence enhancing allegation, has observed that "a defendant's liberty interest 'has been substantially diminished by a guilty verdict.'" (*People v. Wims* (1995) 10 Cal.4th 293, 307, overruled on another ground by *People v. Sengpadychith* (2001) 26 Cal.4th 316, 325-326.)

California courts have applied this or similar reasoning to equal protection challenges. While we recognized in *People v. Hernandez* (1979) 100 Cal.App.3d 637 that liberty is a fundamental interest, we applied the rational basis standard to a legislative distinction between prior in-state and out-of-state convictions as sentence enhancements, noting that there "is a qualitative difference … between the initial interest one has in retaining his [or her] liberty prior to sentencing and the interest one has in whether or not an enhancement applies." (*Id.* at p. 644, fn. 2.)[4] Both *People v. Flores*, *supra*, 178 Cal.App.3d at page 88 and *People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1116, relied on *People v. Hernandez* in concluding the rational basis standard applied to the failure to distinguish the sentences for first and second degree attempted murder, and the firearm enhancement statute, respectively. As we stated in *People v. Flores*, "Appellant does not have a fundamental interest in a specific term of imprisonment.…" (*People v. Flores*, *supra*, at p. 88.)

In the instant case, at the time appellant committed his crime, when he was found guilty, and when he was sentenced, he had no fundamental or statutory right to probation

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[4]While this court disapproved of the language in *Hernandez* on similar facts in *People v. Williams* (1983) 140 Cal.App.3d 445, 450, and indicated the strict scrutiny test should be applied, we distinguished the cases relied upon in *Williams* in *People v. Flores*, *supra*, 178 Cal.App.3d at page 87, footnote 10, on the grounds they were resolved on a purely ex post facto basis and did not infer there was a fundamental right in a shorter term of imprisonment.

or to drug treatment programs that were not yet in existence. His liberty interest was "substantially diminished" by his conviction. (*People v. Wins*, *supra*, 10 Cal.4th at p. 307.) He had no right to be sentenced under a statute that took effect prospectively nearly three months after he was sentenced. In terms of appellant's sentence, equal protection only guaranteed that he would receive no more than the same sentence possible for others with a similar criminal history, i.e., with two prior felonies, who committed a similar crime. We conclude that the rational basis standard is applicable to the change in sentencing schemes for nonviolent drug offenders. There being a rational basis for this change, as discussed above, there is no equal protection problem with not applying Proposition 36 to those defendants who were sentenced prior to July 1, 2001.

In sum, we conclude that since appellant was found guilty and sentenced prior to July 1, 2001, the effective date of Proposition 36, he is not entitled to be sentenced under Penal Code section 1210.1, and that this result does not deprive appellant of equal protection of the laws or of any other constitutional right.

III. Eligibility for Probation

Appellant contends the court erred in denying him probation because his case was an "unusual case" as a matter of law due to the passage of Proposition 36. While appellant acknowledges that the recognized standard of review of the trial court's decision as to whether a case is "unusual" is abuse of discretion, appellant contends it would be an equal protection violation to apply that standard in this case. We disagree.

Appellant has two previous felony convictions, one for possession of a controlled substance and another for possession of a controlled substance for sale. Therefore, unless this case is deemed an "unusual [one] where the interests of justice would best be served if the person is granted probation," appellant is not eligible for probation. (Pen. Code, § 1203, subd. (e)(4) [except in unusual cases, any person previously convicted twice of a felony is not eligible for probation].) "In determining whether [this] statutory limitation on probation has been overcome, the court is required to use the criteria set forth in California Rules of Court, rule [4.413]." (*People v. Superior Court* (*Du*) (1992) 5

Cal.App.4th 822, 830, fn. omitted.) If the court finds the case to be unusual, "it must then decide whether to grant probation, utilizing the statutory criteria set forth in California Rules of Court, rule [4.414]." (*Ibid.*)

"The standard for reviewing a trial court's finding that a case may or may not be unusual is abuse of discretion." (*People v. Superior Court* (*Du)*, *supra*, 5 Cal.App.4th at p. 831.) In applying this standard, "Our function is to determine whether [the grant or denial of probation] is arbitrary or capricious, or '"exceeds the bounds of reason, all of the circumstances being considered."' [Citation.] The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." (*Ibid.*)

In determining whether a case is "unusual," the court may consider "[a] fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case …." (Cal. Rules of Court, rule 4.413(c)(1).)[5] Rule 4.413(c)(1) of California Rules of Court lists two examples of when facts related to the probation ineligibility itself may show an unusual case. Here, appellant relies on the first example to support his contention that his case is unusual—which covers cases where "[t]he fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation." Appellant contends that the limitation on probation—appellant's prior felony convictions—should not be

[5]California Rules of Court, rule 4.413(c)(1)(i) states: "The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate: [¶] (1) A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including: [¶] (i) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence."

considered fully applicable to his case, since the enactment of Proposition 36 "completely changed the sentencing scheme and demonstrated a 'sea' change in the voters' attitude towards nonviolent drug possession" and rendered his case "substantially less serious" than other cases where the defendant convicted of a felony other than nonviolent drug possession has two prior felony convictions.

Appellant's case, however, is not substantially different than the circumstances typically present in any other case where the defendant has two prior felony convictions. The fact that Proposition 36 had been passed by the voters and was to become effective on July 1, 2001, at the time appellant was sentenced, does not make the limiting fact, appellant's two prior convictions, less serious than any other defendant convicted of drug possession, or any other felony, during the same time period and who had two prior felony convictions. This is so because Proposition 36 does not apply to either appellant or any other defendants who might otherwise be eligible for sentencing under Proposition 36 had they been sentenced after its effective date of July 1, 2001.

While we agree with appellant that Proposition 36 changed the sentencing scheme for those convicted of nonviolent drug possession, as explained in part II above, the initiative measure provided for a July 1, 2001, effective date and prospective application of its sentencing provisions. The Legislature may specify that statutes which lessen the punishment for a particular offense "are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written." (*In re Kapperman*, *supra*, 11 Cal.3d at p. 546.) Since the voters did not intend Proposition 36 to have retroactive application, the mere passage of Proposition 36 cannot be a fact indicating that the basis for the statutory limit on probation—here, two prior felony convictions—is not fully applicable to the case.

The trial court specifically considered appellant's argument that this was an unusual case due to the passage of Proposition 36 and its impending effective date and, through the careful exercise of its judicial discretion, rejected it. This was all that was

required of it and does not show an abuse of discretion in deciding that appellant's case was not unusual. (*People v. Cazares* (1987) 190 Cal.App.3d 833, 837-838.)

Appellant contends that because another court might decide that the passage of Proposition 36 makes another defendant's case unusual, it would be an equal protection violation not to require all courts to find all cases unusual where a defendant might otherwise qualify for probation under Proposition 36 except for the fact that he or she was convicted after its passage but before July 1, 2001.

Appellant did not object below to the application of the probation eligibility section on the theory that it deprived him of equal protection of the law. He may not change theories for the first time on appeal. (*People v. Pecci* (1999) 72 Cal.App.4th 1500, 1503.)

In any event, we have concluded that Proposition 36 does not make a case unusual due solely to the fact that it was passed, but not yet in effect, when a defendant with two prior convictions is convicted of a nonviolent drug possession. Appellant's contention is nothing more than a repetition of the attempt to have Proposition 36 apply to him, which attempt we have already rejected. (See, e.g., *People v. Omori* (1972) 25 Cal.App.3d 616, 619-620; *People v. Zapata* (1963) 220 Cal.App.2d 903, 911-912.) While appellant claims this is not true since he is only arguing that a trial court must *consider* his eligibility for probation, rather than requiring a grant of probation, the effect is the same—that Proposition 36 should be applied to him to allow for probation, even though it was not intended to apply to defendants convicted before July 1, 2001. Accordingly, we reject appellant's equal protection claim.

IV. Custody Credits

Appellant contends the trial court miscalculated his presentence custody credits by two days. Respondent concedes the miscalculation. The parties agree that the record shows he received credit for 36 days in custody but only 16 days of conduct credits. Appellant should have received 18 days of conduct credits under Penal Code section 4019, for a total of 54 days of presentence custody credits (36 days ÷ 4 = 9, × 2 = 18).

(See *People v. Dailey* (1992) 8 Cal.App.4th 1182, 1183-1184; *People v. King* (1992) 3 Cal.App.4th 882, 885.)

Despite its concession that the calculation is erroneous, respondent asks that we require appellant to file an appropriate motion with the trial court to correct the error. Since appellant "has raised other issues on appeal in addition to this conduct credit issue, as a matter of efficiency, we dispose of the issue in this opinion." (*People v. Sylvester* (1997) 58 Cal.App.4th 1493, 1496, fn. 3; *People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428.)

We therefore direct the trial court to award appellant two additional days of custody credits.

DISPOSITION

The judgment is modified to award appellant presentence custody credit of 54 days, as calculated above. The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and to forward a certified copy to the Department of Corrections. As modified, the judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Ardaiz, P.J.

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Dibiaso, J.